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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DERICK PAYNE, Plaintiff and Appellant, v. DMITRY GUROVICH, et al., Defendants and Respondents.	B211324 (Los Angeles County Super. Ct. No. BC381478)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Thornton House, Judge. Affirmed.

Derick Payne, in pro. per., for Plaintiff and Appellant.

Gurovich, Berk & Associates and Elon Berk for Defendants and Respondents.

SUMMARY

Derick Payne appeals from the judgment entered after the trial court sustained without leave to amend a demurrer filed by his former criminal defense counsel, Dmitry Gurovich, Elon Berk and Gurovich & Associates, to Payne's first amended complaint for breach of contract, fraud and conspiracy, negligence, common counts and intentional tort. Because the properly pleaded allegations of Payne's complaint constitute allegations of legal malpractice and Payne has failed to allege (and cannot allege) his postconviction exoneration, we affirm.

FACTUAL AND PROCEDURAL SYNOPSIS[1]

According to the allegations of his first amended complaint for breach of contract, fraud and conspiracy, negligence, common counts and intentional tort, Derick Payne retained Dmitry Gurovich, Elon Berk and Gurovich & Associates in March 2004 to represent him in a criminal case (Case No. VA081200).[2] (Our subsequent references to Gurovich are meant to include Berk and Gurovich & Associates unless otherwise indicated.) Gurovich told Payne he had been trained by one of the best criminal

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1 We accept as true all facts *properly pleaded* in Payne's first amended complaint to determine whether the demurrer was properly sustained. (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 373.) In the interests of justice, we also consider judicially noticeable facts, even where the complaint contains express allegations to the contrary; in that event, we disregard the falsely pleaded facts. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 877-878 (*Cantu*).)

2 Payne alleged all allegations were incorporated by reference into every cause of action.

attorneys, had strategies few attorneys had and had won impossible cases. He told Payne his case was not as serious as cases he had handled in the past.[3]

In October, Payne appeared with Gurovich for a pre-trial hearing. Gurovich met with Deputy District Attorney Sean Coen for 45 minutes. Then, Gurovich and Coen had a sidebar discussion with the court. Gurovich told Payne to give Coen 90 days to have a DNA test performed on the weapon which was the subject of the criminal action.[4] Gurovich said Payne had to grant a time waiver because the prosecutor had previously granted him one and he had to reciprocate or he would not get time if he needed it in the future.

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[3] Payne (representing himself in the trial court and on appeal) does not mention the charges in his criminal case. However, he (unsuccessfully) appealed from the judgment in that case (*People v. Payne* (Super. Ct. Los Angeles County, 2006, No. VA081200)), and we take judicial notice of the judgment contained in the record on appeal, which reflects his convictions for assault with a firearm (Pen. Code, § 245, subd. (a)(2)), infliction of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)) and false imprisonment (Pen. Code, § 236).

On appeal, Payne's judgment of conviction was affirmed in all respects. (*People v. Payne* (Mar. 16, 2007, B190580) [nonpub. opn.].) He sought habeas corpus relief (on the basis of ineffective assistance of counsel relating to the DNA testing and new trial hearing among other grounds), but his petition was summarily denied. (B203300.) His petition for review of that denial before the California Supreme Court was also denied. (S158510.)

In addition to the action against Gurovich arising out of his criminal conviction, Payne has filed a number of other actions and pursued 13 appeals or writ proceedings in this regard. In February, he was declared a vexatious litigant in *Payne v. Okorocha*, B210356, and his appeal in that case was dismissed for failure to post security in the amount of $30,000 as ordered.

[4] According to the opinion affirming his criminal conviction, Payne's former wife testified Payne had held her down and stuck a gun down her throat, threatening to kill her (among other things). (*People v. Payne, supra,* B190580, p. 3 [nonpub. opn.].)

Payne was displeased with Gurovich who had refused to disclose his discussions with Coen. Later that month, Payne met with Harlan Braun. Braun reviewed documents Payne provided, concluded Payne had received ineffective assistance of counsel and agreed to take Payne's case, but because of his heavy case load, asked that Gurovich remain as "backup" counsel for pretrial hearings and examination of certain witnesses.

When Payne gave Gurovich an envelope from Braun, Gurovich discouraged Payne from retaining Braun, said Braun would charge around $1 million and told Payne he was not prepared to work with Braun. Braun could not handle the case himself with trial so close so Payne had to continue with Gurovich.

In July, Gurovich had told Payne he would file a motion to dismiss the "bogus allegations" against Payne and would appeal if Payne did not prevail. Gurovich filed the motion in November but did not appear at the December hearing; Berk stood in for Gurovich but did not argue, giving the court reason to deny the motion.

On January 4, 2005, at a further pretrial hearing, Gurovich had another sidebar conference with Coen although Payne had clearly instructed him not to do so since no record would exist. Gurovich knew of Payne's intention not to grant Coen a continuance, but if the court ordered the matter continued in violation of his right to a speedy trial, Payne told Gurovich to "make sure the terms and conditions specified in Mr. Braun[']s letter of 10/18/04 be agreed to in open [c]ourt."[5]

Coen lied to the court and said Payne refused to grant the People an additional continuance to conduct a forensic test on the firearm. Gurovich did not stop Coen and refused to fully disclose the facts to the court. Payne again expressed his discontent with sidebar conferences, and Gurovich acknowledged he was at fault as there was no just reason for a sidebar conversation.

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[5] No letter was attached to the complaint, and Payne did not describe the letter's contents in further detail. However, elsewhere in his complaint, he alleged Gurovich refused to secure a written agreement from Coen for a 50/50 split of the DNA samples from the weapon, but told Payne he had done so. He also alleged, at all times, it was agreed Gurovich was to file a motion seeking release of the weapon for the defense to perform and pay for its own DNA test.

On January 7, Payne's numerous calls to Gurovich went unanswered, and Gurovich showed up at 11:55 for the hearing on the motion to continue scheduled for 8:30. Gurovich had prepared no opposition although he had had two days to do so and allowed Coen to abuse his powers to Payne's detriment. That day, Payne faxed Gurovich a termination of service notice. The next day, Berk called to ask why. Berk told Payne they were preparing a writ, but when he came in to sign it, Payne found no writ had been prepared. Instead, he was being forced to rescind his termination and promised they would do everything this time to have him exonerated. Payne refused to trust them and moved on with different representation.

On or about October 7, Payne learned from Coen that he had obtained permission from Gurovich to consume all DNA samples from the weapon in question. Payne immediately called Gurovich, but Gurovich was out of the country.

On October 14, Payne was convicted of crimes he did not commit as a direct result of a bogus DNA report Coen gave the jurors. According to Coen, Gurovich was fully informed, Coen told him there was an insufficient sample for a split and Gurovich said it was fine to destroy the entire sample and leave nothing for the defense to test independently. The next day, Payne called Berk and quizzed him about what Coen had said. Berk said neither Gurovich nor any defense attorney would have done so, giving a prosecutor a "blank check."

On November 8, Payne spoke with Gurovich about Coen's testimony. Gurovich said he had never given permission to consume the entire sample, he had discussed splitting the sample and defense counsel should move the court for dismissal or a new trial because the prosecutor obstructed justice. Gurovich said he would provide a declaration in this regard. When Payne's then counsel contacted Gurovich, Gurovich demanded changes to Payne's declaration in exchange and then refused to submit the declaration denying he gave Coen permission. Payne's counsel had to serve Gurovich with a subpoena to testify on December 5.

On December 5, the court agreed to continue the matter until January 10, 2006. Payne's counsel used the opportunity to examine Gurovich at the Norwalk courthouse, with Bruce Richland, Mike McCormick, Mitchell Egers and Payne present.[6] Gurovich was asked whether he had given Coen permission on January 5, 2005, to consume the entire sample. He said, "No, however, I would much prefer that you not ask the question so direct, because I like the [g]uy and would hate to see him lo[]se his freedom and profession over this case, sorry Mr. Payne no offense to you."

At the January 10 hearing, Gurovich was called to testify as a witness in the case. He admitted he never consulted with or hired a forensic expert to test the DNA samples from the weapon. The judge saw Gurovich wavering with his answers and specifically asked Gurovich whether he received a call on or about January 5, 2005, requesting permission to consume the DNA sample from the weapon. *Gurovich knew the answer was no but told the judge he had no recollection. Since Gurovich said he had no recollection, the judge denied Payne's motion for new trial, concluding Coen could have called and Gurovich forgot. If Gurovich said Coen had not called, the judge said, he would have had to reverse the conviction or dismiss the case*.

The judge determined Payne's injuries were caused by Gurovich, not Coen, as Gurovich should have kept a record of all events in his file.[7] Had Gurovich performed as agreed, DNA testing would not have resulted in a skewed report favorable to the prosecution.

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6 According to the record in Payne's criminal case, Richland and Egers represented Payne following Gurovich's termination. McCormick filed a declaration identifying himself as Payne's private investigator in that case.

7 As we will explain, Payne's italicized allegations in this regard are specifically contradicted by judicially noticeable facts (the record in his criminal case) and therefore properly disregarded. (*Cantu, supra,* 4 Cal.App.4th at p. 877 ["The complaint should be read as containing the judicially noticeable facts, 'even when the pleading contains an express allegation to the contrary.'"].)

Payne's subsequent counsel also told him the prosecutor said Gurovich had said Payne was willing to plead guilty if he was guaranteed probation, but Payne and Gurovich had no such discussion. Instead, Gurovich had told Payne the prosecutor was talking about probation and did not want to go to trial. Gurovich said trial would take about 10 days at a cost of $2,250 per day in attorney's fees. These were acts of fraud and Gurovich did not intend to perform his contractual duties.

As a result of Gurovich's conduct, Payne said, he lost his four businesses worth $40 million, an airplane worth $750,000, four luxury cars worth over $200,000, real estate worth $1.7 million, $300,000 in cash, other assets worth $5 million and his professional licenses, and he incurred more than $150,000 in debt plus a criminal record for a crime he did not commit.

Gurovich demurred, arguing Payne had failed to state any cause of action, his complaint was uncertain and the statute of limitations barred the negligence cause of action since the representation terminated in January 2005 but the original complaint in this action was filed in November 2007. In opposing the demurrer, Payne submitted selected pages he said were taken from the reporter's transcript of the motion for new trial hearing in his criminal case and requested that the court take judicial notice of this testimony, which included excerpts of Gurovich's testimony at the January 10, 2006 hearing.

The trial court sustained the demurrer without leave to amend, noting in its minute order that Payne had failed to correct the defects the court had previously identified (which had included the failure to adequately plead the elements of a fraud cause of action and the apparent bar of the one-year statute of limitations set forth in Code of Civil Procedure section 340.6) and, more importantly, had confirmed his complaint was "had the defendants handled his underlying criminal case in a different manner, he would not have been found guilty." Citing *Wiley v. County of San Diego* (1998) 19 Cal.4th 532 (*Wiley*), the court stated: "[F]or a criminal defendant to plead causation in a legal malpractice action, plaintiff must plead he was actually innocent of the charges alleged."

Payne appeals.

DISCUSSION

According to Payne, the *Wiley* case has no relevance here as the matter before the court is not a malpractice case. Rather, he says, "Had [Gurovich] performed as [he] promised, and w[as] expected to, not only would [Payne] have been exonerated, but there would never have been a trial." He says the trial court's statement that he must plead actual innocence "convinces [him] that his complaint and first amended complaint were never read by the court." Payne misses the point.

Under *Wiley, supra,* 19 Cal.4th 532, a convicted criminal defendant must allege actual innocence in order to state a cause of action for legal malpractice. Because of the "unique practical and policy considerations against permitting a criminal defendant with an intact conviction to recover on a malpractice claim against his or her former criminal defense counsel," our Supreme Court has determined "a conviction . . . bars proof of actual innocence in a legal malpractice action." (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1204-1205 (*Coscia*).) Instead, "a plaintiff must obtain postconviction relief in the form of a final disposition of the underlying criminal case—for example, by acquittal after retrial, reversal on appeal with directions to dismiss the charges, reversal followed by the People's refusal to continue the prosecution, or a grant of habeas corpus relief—as a *prerequisite* to proving actual innocence in a malpractice action against former criminal defense counsel." (*Id.* at p. 1205, italics added, footnote omitted.) Payne's mere assertion of actual innocence does not suffice.

The rules of *Wiley* and *Coscia* are based on policy considerations. Allowing a former defendant to sue for malpractice without an actual innocence requirement would allow the criminal to take advantage of his own wrongdoing and would impermissibly shift responsibility for the crime away from the criminal. (*Wiley, supra,* 19 Cal.4th at pp. 537-538.) Moreover, guilty defendants have an adequate remedy in the form of postconviction relief for ineffective assistance of counsel. (*Id.* at p. 542.) "Tort law also operates on very different legal principles from the constitutionally reinforced and insulated criminal justice system. 'Tort law provides damages only for harms to the

plaintiff's legally protected interests [citation], and the liberty of a guilty criminal is not one of them. The guilty criminal may be able to obtain an acquittal if he is skillfully represented, but he has no *right* to that result (just as he has no right to have the jury nullify the law, though juries sometimes do that), and the law provides no relief if the "right" is denied him.' [Citation.]" (*Id.* at p. 543, original italics.)

Further, the requirement of postconviction exoneration protects against inconsistent verdicts and promotes judicial economy. (*Coscia, supra,* 25 Cal.4th at p. 1204.) "Many issues litigated in the effort to obtain postconviction relief, including ineffective assistance of counsel, would be duplicated in a legal malpractice action; if the defendant is denied ineffective assistance of counsel, collateral estoppel principles may operate to eliminate frivolous malpractice claims."[8] (*Ibid.*, citing *Younan v. Caruso* (1996) 51 Cal.App.4th 401, 413-414.) The *Coscia* court held "an intact conviction precludes recovery in a legal malpractice action even when ordinary collateral estoppel principles otherwise are not controlling, for example because a conviction was based upon a plea of guilty that would not be conclusive in a subsequent civil action involving the same issues." (*Coscia, supra,* 25 Cal.4th at p. 1204, citation omitted.)

As we noted in *Bird, Marella, Boxer & Wolpert v. Superior Court* (2003) 106 Cal.App.4th 419 (*Bird*), regardless of how a plaintiff labels his causes of action, it is the primary right at issue which determines the applicability of the actual innocence requirement.[9] (*Bird, supra,* 106 Cal.App.4th at p. 427, citing *Lynch v. Warwick* (2002)

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[8] Payne's habeas petition raised multiple issues, including Gurovich's ineffective assistance, but it was summarily denied. (B203300.)

[9] "[A] 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681, citation omitted.) The "primary right is simply the plaintiff's right to be free from the particular injury suffered." (*Ibid.*) It must be distinguished from the legal theory on which liability for that injury is premised and from the remedy sought. (*Id.* at pp. 681-682.) Even where there are multiple theories upon which recovery might be predicated

95 Cal.App.4th 267 (*Lynch*); and see *Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal.App.3d 1019, 1022, citations omitted ["An injury suffered by reason of a defendant's conduct gives rise to a single cause of action, regardless of how many theories are pled by the complaint. . . . Where the injury is suffered by reason of an attorney's professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract."].)

In *Lynch, supra,* 95 Cal.App.4th 267, the complaint listed three causes of action—negligence, breach of contract and breach of fiduciary duty. (*Id.* at p. 269.) Lynch alleged his former defense counsel had failed to perform the professional services for which he was retained. More particularly, he alleged his former attorney failed to interview key witnesses, unnecessarily sought continuances, failed to prevent the loss or destruction of evidence, failed to develop a working relationship of trust and confidence with him, and failed to adequately communicate with him. (*Id.* at p. 270.) The *Lynch* court noted that all three causes of action sought damages based on defense counsel's negligent or inadequate representation and, thus, while titled differently, all sought recovery for legal malpractice. (*Ibid.*, fn. 1.)

The *Lynch* court determined that because Lynch's claims rested on the assertion he had meritorious defenses but defense counsel lost them for Lynch, Lynch's guilt or innocence was at issue and the same policy considerations addressed in *Wiley* and *Coscia* were implicated. (*Lynch, supra,* 95 Cal.App.4th at pp. 272-275.) Consequently, the actual innocence requirement in criminal malpractice cases barred Lynch's claims. (*Ibid.*) "In *Wiley*, the court observed there would be situations where the criminal defense attorney was clearly negligent, such as when the attorney failed to raise a technical defense that would have resulted in a complete dismissal of the case, and yet the Supreme Court held the actual innocence requirement applied in these circumstances." (*Lynch, supra,* 95 Cal.App.4th at p. 275, citing *Wiley, supra,* 19 Cal.4th at pp. 540-543.)

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and although the injured party might be entitled to many forms of relief, the "violation of one primary right constitutes a single cause of action. . . ." (*Id.* at p. 682.)

Similarly, Payne's complaint in this case lists five causes of action--breach of contract, fraud and conspiracy, negligence, common counts and intentional tort. However, as we stated in *Bird, supra,* 106 Cal.App.4th at page 427, "the nature of a cause of action does not depend on the label the plaintiff gives it or the relief the plaintiff seeks but on the primary right involved." Like the plaintiff in *Lynch,* Payne alleges Gurovich deprived him of meritorious defenses and similarly places his guilt or innocence at issue, implicating the same policy considerations the California Supreme Court addressed in *Wiley* and *Coscia.* Thus, with respect to *Lynch,* we observed: "It is clear from the allegations in Lynch's complaint the primary right involved in his suit against [his former defense counsel] was the right to competent legal representation." (*Bird, supra,* 106 Cal.App.4th at p. 427.)

It is equally clear from the allegations in Payne's complaint the same primary right to competent legal representation is involved. Therefore, under *Wiley, supra,* 19 Cal.4th 532, and *Coscia, supra,* 25 Cal.4th 1194, Payne was required to obtain postconviction exoneration as a prerequisite to proving actual innocence, a necessary element of his criminal malpractice claims. As Payne did not allege and does not demonstrate that he can amend his complaint to allege his postconviction exoneration, Gurovich's demurrer was properly sustained without leave to amend. (*Coscia, supra,*25 Cal.4th at p. 1201 ["an individual convicted of a criminal offense must obtain reversal of his or her conviction, or other exoneration by postconviction relief, in order to establish actual innocence in a criminal malpractice action."].)

In *Bird, supra,* 106 Cal.App.4th at page 428, we noted that "[c]ourts in other states which have adopted the actual innocence rule in criminal malpractice cases have recognized the rule does not automatically apply to every dispute between a convicted client and former counsel."[10] We noted an Illinois case in which a convicted criminal

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10 In *Bird, supra,* 106 Cal.App.4th 419, 421, we held that when the primary rights asserted in the complaint are the rights to be billed in accordance with specific contractual provisions and to be free from unethical or fraudulent billing practices on the part of defense counsel, the client need not allege actual innocence in order to state a

defendant sued his former attorneys claiming, among other things, they had breached their fiduciary duty to him by disclosing privileged attorney-client communications to the prosecution. (*Bird, supra,* 106 Cal.App.4th at p. 428, citing *Morris v. Margulis* (Ill.App. 1999) 307 Ill.App.3d 1024 [718 N.E.2d 709, 241 Ill. Dec. 138], reversed on other grounds (2001) 197 Ill.2d 28 [754 N.E.2d 314, 257 Ill. Dec. 656].) There, the court concluded the application of the actual innocence rule would be "unconscionable" and held the "'"actual innocence" rule will not be applied to situations where an attorney willfully or intentionally breaches fiduciary duties he owes to his criminal defense client.'" (*Bird, supra,* 106 Cal.App.4th at p. 428, quoting *Morris v. Margulis, supra,* 718 N.E.2d at pp. 720-721.)

We are not presented with such a case. Here, although Payne alleged Gurovich was solely and directly responsible for the trial court's denial of Payne's motion for a new trial because Gurovich intentionally gave false testimony to help the prosecutor at Payne's expense, we disregard these allegations as falsely pleaded facts.[11] (*Cantu, supra,* 4 Cal.App.4th at p. 878.)

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cause of action for breach of contract, breach of fiduciary duty, fraud and money had and received. As we explained in *Bird,* such a fee dispute between a convicted criminal defendant and his former counsel--to the extent it involves the quantity and not the quality of legal services performed--does not entail the same policy considerations which arise from a malpractice suit. (*Id.* at pp. 428-430.) Payne does not allege such a claim.

[11] Similarly, Payne asserts in his opening brief that "[his] contention in his complaint before the [trial court] is, the Trial Court in People v. Payne, the Second Appellate [District], the Attorney General, and the [California] Supreme Court, all agreed his [a]ttorney Gurovich caused his injuries. Gurovich had a chance to exonerate him but refused to do so when he testified on 1/10/2006." After Gurovich stated in his respondent's brief "at no point in time, did any court find that [Payne] was a victim of ineffective assistance of counsel," Payne stated in his reply that "Judge Michael Cowell ruled that [Payne] had ineffective assistance of counsel," citing the third paragraph of page 15 of the reporter's transcript of the August 2, 2007 hearing in VA081200 (the criminal case).

(Fn. 11 continued)

It is true, as Payne asserts, when reviewing a demurrer on appeal, we generally assume all facts plead in the complaint to be true. (*Cantu, supra,* 4 Cal.App.4th at p. 877, citation omitted.) In addition, however, "in the interests of justice, on demurrer, a court will also consider judicially noticeable facts, even if such facts are not set forth in the complaint." (*Ibid.*) Moreover, as we said in *Cantu, supra,* 4 Cal.App.4th at page 877, we "may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from both the same case *and other cases*." (*Ibid.*, citing Evid. Code, § 452, Code Civ. Proc., § 430.70, additional citations omitted, original italics.) "The complaint should be read as containing the judicially noticeable facts, '*even when the pleading contains an express allegation to the contrary*.'" (*Ibid.*, citation omitted, italics added.) A plaintiff may not avoid demurrer "by suppressing facts which prove the pleaded facts false." (*Ibid.*, citation omitted.) """"The principle is that of *truthful pleading.*"""" (*Ibid.*, citation omitted, original italics.)

According to Payne's complaint, at the hearing on January 10, 2006, Gurovich was asked "whether or not he ever received a call from [the prosecutor] on or about 1/05/2005 requesting permission to consume the DNA [s]ample from the weapon. *Gurovich who knew the answer was no, told the Judge he had no recollection. The Judge concluded that since he had no recollection, the [prosecutor] could have called him and he forgot. He therefore denied [Payne's] Motion for a New Trial . . . . The Judge stated*

Once again, Payne has misrepresented the record. We take judicial notice of the copy of the August 2, 2007, reporter's transcript Payne submitted as an exhibit in support of his petition for Supreme Court review of his habeas petition (S158510). At page 15 of this transcript, not only is Payne directing the court's attention to his *subsequent* counsel's failure to pursue a motion to quash a subpoena for telephone records, but the trial court's statement was simply the following: "Ineffective assist[ance] of counsel is something that can be raised on appeal. If your contention is that this is something you found out afterwards, and your attorney dropped the ball because he had issued a subpoena duces tecum, there was a responsive motion to quash, and he didn't choose to proceed, if this is your contention, that should have been raised on appeal." (In his criminal appeal (represented by counsel), he raised no claim of ineffective assistance of counsel. (*People v. Payne, supra,* B190580.)) Once again, Payne's characterization of the record is demonstrably and indisputably false.

had Gurovich said he did not get a call from [the prosecutor], he would have had to reverse the conviction or dismiss the case." (Italics added.) Along with his opposition to Gurovich's demurrer, Payne filed a request for judicial notice, asking the court to take judicial notice of (among other things) "the sworn testimony of Dmitry Gurovich on 1/10/2006," and submitted selected pages of the reporter's transcript of Gurovich's testimony at the January 10, 2006, hearing (as well as pages from other hearing dates) in his criminal case (Case No. VA081200).

Even accepting as true Payne's assertion that Gurovich said *prior to the hearing on the motion for new trial* he did not want the question (about whether the prosecutor called Gurovich on January 5, 2005, and requested permission to consume the entire DNA sample) asked so directly, having reviewed the transcript of the January 10, 2006, hearing in the criminal case in its entirety, the record establishes that Payne's new counsel did press Gurovich on the issue, and Gurovich specifically denied the prosecutor had ever told him the DNA sample would be consumed by testing and denied giving the prosecutor permission to proceed in this manner. Moreover, it is beyond dispute that the trial court made none of the statements Payne alleges, indicating that had Gurovich simply said no to the court's question, Payne's conviction would have been reversed or the case dismissed. To the contrary, the trial court stated that, even if it would have been "very nice if a letter had been sent that was logged in the district attorney's file indicating that Mr. Gurovich was formally notified that he had all of these options available to him, he could have an expert there for the testing," although none had yet been retained, all of that was irrelevant. "*The fact is, none of that is required by law*."[12] (Italics added.)

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12 We do not take judicial notice of the truth of the facts found by the trial court in the criminal case; rather, in light of Payne's reliance on the reporter's transcript of this date as evidenced by his request for judicial notice of the selected pages he submitted, we take judicial notice of the facts that the trial court found as it did (and Gurovich testified as he did)—demonstrating Payne's allegations to be false. (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1565.)

As Payne was arguing he was entitled to a new trial as a result of prosecutorial misconduct in the prosecutor's failure to obtain defense permission to consume the DNA sample, the trial court stated this was no basis for relief under *People v. Griffin* (1988) 46 Cal.3d 1011. The court referred to the following text: "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [citations], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed . . . ." (*People v. Griffin* (1988) 46 Cal.3d 1011, 1020-1021, quoting *California v. Trombetta* (1984) 467 U.S. 479, 488-489.)

"It turns out the value was inculpatory because it tends to show the presence of the complainant's DNA. But there's no way this would have been apparent before the evidence was destroyed." Again quoting from the *Griffin* case, the court continued: "'When a piece of evidence in the possession of the prosecution is destroyed because the prosecution finds it necessary to consume the evidence in order to test it, there is no due process violation.'" (*People v. Griffin, supra,* 46 Cal.3d at p. 1021.)

Once Payne's falsely pleaded facts are disregarded, all that remains are allegations of legal malpractice. In *Coscia*, the court stated: "We have no occasion in the present case to determine whether there might be exceptional circumstances—for example, where the plaintiff establishes that habeas corpus or other postconviction relief is unavailable and that he or she could not reasonably have been expected to have pursued such measures—under which a plaintiff should be afforded an opportunity to establish actual innocence in the malpractice action itself." (*Coscia, supra,* 25 Cal.4th at p. 1205, fn. 4.) Payne has not alleged any such circumstances here. We find that Payne's criminal malpractice claims are barred under *Wiley, supra,* 19 Cal.4th 532, and *Coscia, supra,* 25 Cal.4th 1194. Accordingly, we need not address the further bases the trial court identified for sustaining the demurrer without leave to amend.

DISPOSITION

The judgment is affirmed. Gurovich is entitled to his costs of appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.